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The Warrant of Attorney to Confess Judgment

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The practice of executing a warrant of attorney to confess judgment is one of considerable antiquity. Prior to the time of our Revolutionary War, Blackstone in his *Commentaries* mentioned the practice in the following words, "And therefore it is very usual, in order to strengthen a creditor's security for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem* or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due."¹ The *cognovit actionem* referred to, was a written confession given by the defendant after process was sued out. The common term "cognovit note" is applied to a promissory note containing a warrant of attorney to confess judgment. At one time such a warrant

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¹ 2 COOLEY'S BLACKSTONE (4th Ed. 1899) 1152. The quotation is found in Book III, p. 397, The Third Book of *Commentaries* was published in 1768, see 1 COOLEY, *supra* p. 1.

would have contained an authorization to file a *cognovit actionem*. Hence the adjective "cognovit."²

It is customary to think of cognovit judgments in connection with negotiable promissory notes, and they are unquestionably more commonly encountered in that connection than in any other.³ The Uniform Negotiable Instruments Law provides that, "The negotiable character of an instrument otherwise negotiable is not affected by a provision which **2. authorizes a confession of judgment if the instrument be not paid at maturity."⁴ This provision is a part of the statutory law of every state except South Dakota.⁵

But aside from the question of negotiability the attitude toward the warrant of attorney to confess judgment varies from one state to another. In Ohio and many other states the warrant is very commonly used, and it is safe to assume that in such states more notes are issued which contain such a clause than do not.⁶ In addition to the above quoted provision from the Negotiable Instruments Law the Ohio General Code has a number of sections which make reference to warrants of attorney.⁷ This ex-

² For instances of the use of the terms "cognovit judgment" and "cognovit note" see *Bulkley v. Green*, 98 Ohio St. 55, 59, 120 N. E. 216 (1918), and *First National Bank v. Smith*, 102 Ohio St. 120, p. 121, 130 N. E. 502 (1921). See *Drose v. Balla*, 181 Ind. 491, 499, 104 N. E. 851, 854 (1914), for common law distinctions.

³ See *Swisher v. Orrison Cigar Co.*, 122 Ohio St. 195, 198, 171 N.E. 92 (1930).

⁴ Section 5, OHIO G. C., Sec. 8110.

⁵ BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th Ed. Beutel 1938) 7, no similar provision is to be found in the English Bills of Exchange Act 1882, after which the uniform N.I.L. was largely patterned, *id.* at 177.

⁶ See *Swisher v. Orrison Cigar Co.*, 122 Ohio St. 195, 198 (1930) cited *supra* note 3. It has been said that approximately 82% of the banks of Pennsylvania use judgment notes. See *Tanner, Uniformity of Judgment Notes*, 44 DICK L. REV. 173 (1940). In at least a dozen other states they are more or less widely used. See *Notes*, cited *infra* n. 8.

⁷ OHIO G. C., Sec. 11597, "An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for

PLICIT recognition of their validity is quite different from the attitude evidenced by statutory provisions in other states which declare them unenforceable or void.⁸ In still other states the use of the warrant seems to be practically unknown although not forbidden by statute.⁹

The widespread use of the cognovit note in this and

making it to the court before which he makes the confession, and the original or a copy of the warrant shall be filed with the clerk."

Sec. 11598, "A warrant of attorney to confess judgment, executed by a person in custody, in favor of the person at whose suit he is in custody, shall be of no force unless executed in presence of an attorney expressly named by the person in custody, and signed by him as a witness."

Sec. 11282, "When the action is rightly brought in any county, according to the provisions of the next preceding chapter, a summons may be issued to any other county, against one or more of the defendants, at the plaintiff's request; but no maker or acceptor, or if the bill be not accepted, no drawer, of an instrument for the payment of money only, shall be held liable in an action thereon, except on a warrant of attorney, in any county other than the one in which he, or one of the joint makers, acceptors, or drawers, resides or is summoned."

Sec. 11139, "The foregoing provisions shall not prejudice or affect securities given, or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or securities given within such time to create a preference among creditors, or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor, in case of assignment, to the extent above provided."

⁸ See Ann. "Constitutionality, construction, application, and effect of statutes invalidating powers of attorney to confess judgment or contracts giving such power." 111 A.L.R. 1407, Note, *Validity of warrant of attorney to confess judgment*. (1938) 16 TEX. L. REV. 585; Note (1931) 44 HARV. L. REV. 1275, 1277. From these notes it would appear that warrants of attorney are void or their use seriously restricted by statute in the following states: Alabama, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, New Jersey, New York, New Mexico, Tennessee, Texas, Virginia, Washington.

For an example of drastic legislation intended to discourage the use of cognovit notes see BURNS IND. STAT. ANN. 2-2904, 5 and 6, and comments thereon in Farabagh and Arnold, *Commentaries on the Public Acts of Indiana*, (1927) 111, *The Cognovit Note Act* (1929) 5 IND. L.J. 93; Gavit, *The Indiana Cognovit Note Statute* (1929) 5 IND. L.J. 208; Ogden, *Negotiability of Judgment Notes* (1928) 3 IND. L.J. 695.

⁹ See e.g. *First Nat. Bk. v. White*, 220 Mo. 717, 120 S.W. 36, 132 Am. St. Rep. 612 (1909), *Utah Nat. Bk. v. Sears*, 13 Utah 172, 44 Pac. 832 (1896), *Farquhar & Co. v. DeHaven*, 70 W. Va. 738, 75 S.E. 65, 40 L.R.A. (N.S.) 956 (1912), see also cases cited in Ann. 40 L.R.A. (N.S.) 956.

some other states would seem to demonstrate that it is a device which has distinct advantages. One wonders that the warrant of attorney has not been more widely utilized in connection with other forms of written contract. In some jurisdictions statutes limit its use to certain named instruments.¹⁰ In other jurisdictions, including Ohio, there is no restriction found in the statutes. Isolated instances appear indicating the use of warrants of attorney in leases and other instruments.¹¹ In Pennsylvania and Illinois, judging by the number of reported cases, it seems to be a common practice to include a cognovit clause in a lease whether of real or personal property.¹² The advantage thereby given the lessor in taking judgment for overdue rent is apparent. Since lessors are in much the same position as payees of notes in being able to dictate the terms of their contracts it is surprising that the cognovit clause has not been inserted in leases more frequently than it has. Warrants of attorney are also being used to a considerable extent in connection with conditional sales contracts.¹³

The standard forms of cognovit clause authorize "any attorney at law to appear in any court of record," or "in any court of record in Ohio," or "in any court of record in the United States," and to confess judgment. Certain questions are raised by the use of such language. Could any person other than an attorney at law be authorized to

¹⁰ See *United Finance Corp. v. Peterson*, 208 Wis. 104, 241 N.W. 337 (1932), *Roman Auto Co. v. Miller*, 5 Boyce (Del.) 586, 95 Atl. 654 (1915).

¹¹ In *Mithoff v. Columbus Lodge, K. of P.*, 7 Ohio N.P. 630, commented upon in 34 W.L.B. (1895), a cognovit clause in a lease was upheld. At the present time cognovit clauses appear in certain leases and similar instruments in effect in Columbus.

¹² See *Baldwin v. Amer. Motor Sales Co.*, 309 Pa. 275, 163 A. 507 (1932), *Beers v. Fallen Timber Coal Co.*, 307 Pa. 261, 161 A. 409 (1932), *Gen. Realty Co. v. Gold*, 293 Pa. 260, 142 A. 279 (1928), *Hyman v. Anschicks*, 270 Ill. App. 202 (1933), *Richman v. Monrath*, 266 Ill. App. 1 (1932).

¹³ See Ann. *Validity and effect of cognovit or warrant of attorney to confess judgment in conditional sale contract*, 89 A. L. R. 1106.

so appear and confess judgment? While no Ohio cases have been found which involved warrants authorizing others than attorneys to confess judgment, cases in other states have upheld such warrants.¹⁴ In Pennsylvania as early as 1806 provision was made for the prothonotary entering judgment on a note containing a warrant of attorney without the agency of an attorney or even the necessity of filing a declaration.¹⁵

If the warrant, as is usual, limits the authority to appear in "a court of record," this would limit the holder in Ohio to filing his petition in the common pleas court or a municipal court. Each municipal court act makes the court thereby created a court of record. Except for the common pleas court other courts of record in this state would have no jurisdiction in such matters.¹⁶ The amount involved would determine whether the petition might be filed in a common pleas court or in any given municipal court. If the amount of the confessed judgment would be \$100 or less the common pleas court would have no jurisdiction.¹⁷ If the amount exceeded the maximum jurisdiction of the particular municipal court, the common pleas court would be the only possibility.¹⁸ Between \$100 and the maximum limit of the municipal court resort to either the common pleas or municipal court would be possible. If the warrant, departing from the usual form, purported to authorize confession in any court, whether of record or not, the result would be probably no different in this state.

¹⁴ 3 FREEMAN, JUDGMENTS (5th Ed. 1925) 2722.

¹⁵ See Klem, *The Entry of Judgment by Confession on Promissory Notes*, 32 DICK. L. REV. 191 at 194 (1928).

¹⁶ The original jurisdiction of the Supreme Court and Courts of Appeals fixed by OHIO CONST. Art. VI Sections 2 and 4 respectively does not include such litigation. The Probate Court has not such jurisdiction since it is not included in the enumerated classes in OHIO GEN. CODE, Sec. 10501-53.

¹⁷ OHIO G. C., Sec. 11215 and 10226.

¹⁸ Except for another municipal court with a maximum jurisdictional limit in excess of the amount claimed.

It was held many years ago by the Supreme Court¹⁹ and since reaffirmed by a court of appeals²⁰ that the jurisdiction of a justice of the peace is so limited that he cannot render judgment under a warrant of attorney

A warrant which attempts to authorize appearance "in any court of record in United States," or "in Ohio or elsewhere" raises a rather difficult problem if exercised in a state other than that of execution. In some states such authorization would be given effect and judgment permitted pursuant thereto.²¹ Some of the inferior courts in Ohio have looked with disfavor on a warrant purporting to grant authority to confess judgment in a state other than that in which it was drawn.²² The Ohio Supreme Court has not been required to decide the question.²³ A court in a state which has a policy opposed to warrants of attorney to confess judgments will nevertheless give effect to a judgment so confessed in another state in which the judgment is valid.²⁴

Questions arise as to the parties who may execute valid warrants of attorney to confess judgments. It was the rule at common law that an infant's power of attorney was void.²⁵ In those states which generally recognize the

¹⁹ *McCleary v. McLain*, 2 Ohio St. 368 (1863).

²⁰ *City Loan and Sav. Co. v. Kyler*, 50 Ohio App. 390, 393, 198 N.E. 503, 18 Abs. 29, 2 Ohio Op. 303 (1934).

²¹ 3 FREEMAN, JUDGMENTS (5th Ed. 1925) 2717, citing *Pirie v. Stern*, 97 Wis. 150, 65 Am. St. Rep. 103, 72 N. W. 370 (1897), (The case is *Pirie v. Conrad* in 72 N.W. 370).

²² *Davis v. Packer*, 8 Ohio C.C. 107 (1894), *McCure v. Bowles*, 5 Ohio N.P. 327, 5 Ohio Dec. (N.P.) 288 (1898).

²³ See Ann. *Judgment entered in sister state under a warrant of attorney to confess judgment*, 40 A.L.R. 441, Suppl. in 89 A.L.R. 1503.

²⁴ See Ann. *Constitutionality, construction, application and effect of statutes invalidating powers of attorney to confess judgment or contracts giving such power*, 111 A.L.R. 1407 at 1408, and Ann. *Judgment entered in sister state under a warrant of attorney to confess judgment*, 40 A.L.R. 441, Suppl. in 89 A.L.R. 1503.

²⁵ 3 FREEMAN, JUDGMENTS (5th Ed. 1925) 2708.

validity of warrants of attorney to confess judgment, such a warrant executed by an infant is generally considered void although there is some doubt whether it is not merely voidable.²⁶ An executor, administrator, guardian or other fiduciary authorized to make promissory notes in his representative capacity would certainly not be precluded from including a cognovit clause in any such note.²⁷

Before a judgment by confession is rendered against an individual it must clearly appear that he has authorized such a judgment. Hence judgment can not be taken against an indorser where he has not signed a warrant of attorney although his indorsement appears on the back of a note containing such a warrant signed by the maker.²⁸ One of the most common statements made by courts in dealing with warrants of attorney is to the effect that they must be strictly construed and that the authority given must be strictly pursued.²⁹ Consistent with this idea it has sometimes been held that a warrant which is joint in form would not permit judgment against one of several joint makers without the others, although there are authorities to the contrary.³⁰ In Ohio it seems to be established that death of one joint maker will prevent entry of judgment against the others.³¹

A partner may successfully attack a judgment against the partnership where the partner who signed the warrant

²⁶ See Ann. *Infant's appointment of agent, and acts of agent thereunder as void voidable*, 31 A.L.R. 1001, 1017. *Metzger v. Zeissler*, 13 Ohio N. P. (N.S.) 49 (1912), 31 C.J. 1003.

²⁷ 3 FREEMAN, JUDGMENTS (5th Ed. 1925) 2707.

²⁸ *Schuck v. McDonald*, 58 Ohio App. 394, 399, 16 N.E. (2d) 613, 12 Ohio Op. 233 (1938). 3 FREEMAN, *Op. Cit. supra* n. 25 at 2746.

²⁹ *Spence v. Emerine*, 46 Ohio St. 433, 21 N.E. 866, 15 Am. St. Rep. 634 (1889), *Cushman v. Welsh*, 19 Ohio St. 536 (1869), 3 FREEMAN, *op. cit. supra* n. 25 at 2756, 23 OHIO JUR., "Judgments," 738.

³⁰ See Ann. *Warrant of attorney to confess judgment signed by two or more as joint, or several, or joint and several*, 89 A.L.R. 403.

³¹ *Hoffmaster v. McKelvey Co.*, 88 Ohio St. 552, N.E. (1913), *Saulpaugh v. Born*, 23 Ohio App. 275, 154 N.E. 166 (1925)

of attorney had no authority to do so.³² However the partner signing the firm name is bound by the judgment so taken.³³ While a corporation may execute a valid warrant of attorney to confess judgment the authority of the officer or agent purporting to represent the corporation must be expressly given or clearly implied from authority so given.³⁴

Where judgment is sought on a cognovit note executed in another state a difficult problem of conflict of laws is raised.³⁵ Authority may be found for applying the law of any one of several different places in determining the validity and effect of the warrant.³⁶ The law of the residence of the maker, of the place of contracting and of the forum have each been suggested in one or more cases as preferable.³⁷ It seems that the most frequently prevalent rule is that applying the place of performance when judgment is sought there.³⁸ In case it is sought in a state other than that designated as the place of payment of the note, the law of the forum would be preferred.³⁹

When judgment on a cognovit note has been rendered

³² 3 FREEMAN, *op. cit. supra* n. 25 at 2711, Hurshman, *Power of a Partner to Confess Judgment against the Partnerships in Pennsylvania*, (1914) 62 U. PA. L. REV. 621, see *McAlpin Co. v. Finsterwald*, 57 Ohio St. 524, 544, 49 N.E. 784 (1898), *Pace v. Pace*, 57 Ohio App. 281, 13 N.E. (2d) 578, 10 Ohio Op. 455, 26 O. L. Abs. 213 (1936).

³³ *Ibid.* See also 23 O. JUR. 749. Ann. *Personal liability to other party to contract of member of firm without authority, attempts to bind the firm*, 4 A.L.R. 258, 262.

³⁴ 3 FREEMAN, *op. cit. supra* n. 25 at 2713, see *First Nat. Bk. v. McKinney*, 16 Ohio C.C. 80, 85 (1898), *Manley v. Mayer*, 68 Kan. 377, 75 P. 550 (1904), Note (1928) 16 GEO. L. J. 495.

³⁵ See RESTATEMENT, CONFLICT OF LAWS (1934) Sec. 332, 343, 344, 347.

³⁶ See cases cited in Note, *Jurisdictional rule concerning judgments confessed under warrant of attorney*, (1934) 3 BROOK. L. REV. 236.

³⁷ *Ibid.*

³⁸ *Ibid.* 3 FREEMAN, *op. cit. supra* n. 25 at 2723.

³⁹ *First Nat. Bk. v. McKinney*, 16 Ohio C.C. 80 (1898), 3 FREEMAN, *op. cit. supra* n. 25 at 2724.

in a state which recognizes the validity of such judgments, it will be enforced in the courts of another state although the policy of the latter is opposed to taking such judgments.⁴⁰ It is generally held that the full faith and credit clause of the Federal Constitution⁴¹ extends to cognovit judgments as well as to others.⁴² When suit is brought in a state which prohibits or seriously restricts cognovit judgments to enforce such a judgment taken in another state it sometimes happens that there is a failure of proof as to the laws of the other state with reference to warrants of attorney.⁴³ In such situations two conflicting presumptions have been resorted to. A court in a state in which warrants of attorney are not recognized may uphold a cognovit judgment of a sister state indulging in the presumption that such judgment is fully justified under the law prevailing at the place of its rendition.⁴⁴ On the other hand the presumption has been made that the law of the other state is similar to that of the state of the forum and

⁴⁰ *Cook v. Brown*, 346 Mo. 281, 140 S.W. (2d) 42, 128 A.L.R. 1396 (1940), *Carroll v. Gore*, 106 Fla. 582, 143 So. 633, 89 A.L.R. 1495 (1932), *Ann. Judgment entered in sister state under a warrant of attorney to confess judgment*, 40 A.L.R. 441, Suppl. in 89 A.L.R. 1503. *But see* *Baldwin Bldg. & L. Assoc. v. Klein*, 136 Misc. Rep. 752, 240 N.Y.S. 804 (1930), holding that Pennsylvania cognovit judgment against a New York resident was not conclusive in New York. Note (1930) 30 COL. L. REV. 739; *Bernard & Gloeckler Co. v. Baker Co.*, (1932 Tex. Civ. App.) 52 S.W. (2d) 912; Note (1933) 11 TEX. L. REV. 246, Note (1900) 51 CENT. L. JOUR. 265.

⁴¹ U.S. CONST., Art. IV, Sec. 1.

⁴² Note, *Full faith and credit for judgments confessed by attorney*, (1931) 44 HARV. L. REV. 1275 and authorities cited *supra* n. 40.

⁴³ The problem is somewhat affected by the state of the law relating to judicial notice of the laws of other states. In a third or more of the states laws have been passed requiring such judicial notice. *See* Hallen, *Uniform Evidence Acts* (1939) 6 O.S. L.J. 25, at 38. The Uniform Judicial Notice of Foreign Law Act, in modified form, was adopted in Ohio in 1939. OHIO G.C. 12102-31 to 37, 118 O.L. 678.

⁴⁴ *Hastings v. Bushong*, 252 S.W. 246 (Tex. Civ. App. 1923).

the judgment held void because it would have been void in the latter state if taken there.⁴⁵

The Ohio Supreme Court⁴⁶ refused to recognize as valid judgments entered by a prothonotary in Pennsylvania upon cognovit notes not yet due although under the law of Pennsylvania such judgments before maturity are permissible.⁴⁷ Presented with the same problem the New York Court of Appeals took the other view. Although cognovit notes are not favored in New York, the court said that a cognovit judgment entered before maturity in Pennsylvania would be valid in New York because such judgments were permitted not only by the law of Pennsylvania but by that of every other country where judgments by confession are permitted.⁴⁸

From the cases the following rules as to the termination of the authority contained in a warrant of attorney may be gathered,

- (1) The power to confess judgment being a part of a contract in which rights are conferred is not revocable by the signer assuming that he was capable of making the contract.⁴⁹
- (2) The power is terminated by the death of the signer and in the case of joint signers by the death of either.⁵⁰

⁴⁵ *McNair v. Underwood*, 55 Okla. 585, 155 Pac. 553 (1916), *Harn v. Cole*, 20 Okla. 553, 95 Pac. 415 (1908).

⁴⁶ *Spier v. Corll*, 33 Ohio St. 236 (1877).

⁴⁷ Ann. 40 A.L.R. 441, cited *supra* n. 40 at 451.

⁴⁸ *Teel v. Yost*, 128 N.Y. 387, 28 N.E. 353, 13 L.R.A. 796 (1891). It should be stated that such notes are non-negotiable even in Pennsylvania. See Klein, *Entry of judgment by confession on promissory notes*, (1928) 32 DICK. L. REV. 191 at 193, citing *Milton Nat. Bank v. Beaver*, 25 Pa. Super. 494 (1904), and *Hoverter v. Consedine*, 82 Pa. Super. 294 (1923). Long prior to the adoption of the Negotiable Instruments Law a similar view was expressed in the famous case of *Overton v. Tyler*, 3 Pa. 346 (1846). See also Tanner, *Uniformity of Judgment Notes in Pennsylvania*, (1940) 44 DICK. L. REV. 173 at 177.

⁴⁹ 3 FREEMAN, *op. cit. supra* n. 25 at 2724, 23 OHIO JUR., "Judgments," 741.

⁵⁰ *Ibid*, *Hoffmaster v. McKelvey Co.*, 88 Ohio St. 552, 106 N.E. 1061

- (3) A discharge in bankruptcy granted to the signer terminates the prior authority to confess judgment.⁶¹
- (4) Subsequent insanity of the signer does not terminate the authority.⁶²

There is some confusion in the cases as to whether the warrant of attorney executed as part of a note is a power coupled with an interest.

The statement by the Ohio Supreme Court⁶³ that it is a power coupled with an interest and cannot be revoked by the maker nor by his insanity has been criticized by the court of appeals in *Schuck v McDonald*.⁶⁴ It is there pointed out that the United States Supreme Court held in

(1913), *Saulpaugh v. Born*, 22 Ohio App. 275, 154 N.E. 166 (1925), *Schuck v. McDonald*, 58 Ohio App. 394, 16 N.E. (2d) 619, 12 Ohio Op. 233, (1938), Comment (1938) 12 U. CIN. L. REV. 613. *Ann. Death or incompetency of principal as affecting existing power of attorney to confess judgment*, 44 A.L.R. 1310. Compare, RESTATEMENT, AGENCY (1933) Sec. 139 (1) "Unless otherwise agreed, a power given as security is not terminated by (a) revocation by the creator of the power; (b) surrender by the holder of the power, if he holds for the benefit of another; (c) the loss of capacity during the lifetime of either the creator of the power or the holder of the power; or (d) the death of the holder of the power, or, if the power is given as security for a duty which does not terminate at the death of the creator of the power, by his death." Compare, *National Bank v. Jerko*, 25 Ohio N.P. (N.S.) 445, at 452 (1925) "This court has had before it in the past a number of cases in which the payee, named in a cognovit note such as this but not with the same warrant of attorney but one which unquestionably was valid in this state, died and the court has held in each instance that the personal representative of the payee could not take advantage of the warrant of attorney but that jurisdiction over the defendant could only be acquired by either this issuing of summons or the voluntary appearance of the defendant. No one has seemingly seriously questioned the correctness of this holding."

⁶¹ 23 OHIO JUR., "Judgments," 741, citing *Dye v. Bartram*, 5 O. Dec. (Rep.) 508, 6 Am. L. Rec. 355 (1877).

⁶² *Swisher v. Orrison Cigar Co.*, 122 Ohio St. 195, 171 N.E. 92 (1930), 23 OHIO JUR., "Judgments," 741.

⁶³ *Ibid.*

⁶⁴ 58 Ohio App. 394, 16 N.E. (2d) 619, 12 Ohio Op. 233 (1938), cited *supra* n. 50. See also Comment (1938) 12 U. CIN. L. REV. 613, Note (1931) 4 So. CALIF. L. REV. 315.

*Hunt v Ronsmaiser*⁵⁵ that the power of attorney there involved was a naked power. The court of appeals took the same view with regard to the warrant of attorney in a cognovit note. It held the power terminated upon death of the maker and distinguished the *Swisher* case on the basis of its involving insanity rather than death of the maker. Quotation is made from a Pennsylvania case *Spencer v Reynolds*,⁵⁶ that "It is not a power coupled with an interest, but it is a power which has grown up under our common and statute law, which the defendant cannot, by any act of his, revoke."

The procedure for vacation of cognovit judgments in Ohio is similar to that which applies to vacating other judgments. During the same term of court at which the judgment is rendered the proper procedure is by motion and in such case the court has broad discretion in the matter of setting aside the judgment.⁵⁷ For purposes of preserving priority of lien the order of vacation is suspended until the determination of the merits following an order of vacation.⁵⁸ The Supreme Court has held that the requirements of the statute pertaining to vacating judgments rendered at a former term need not be followed where motion to vacate is made at the same term.⁵⁹

At a subsequent term the procedure is to file a petition in the original action, cause summons to be served on the plaintiff who need not plead to the petition. The petition should contain one or more of the grounds for vacation

⁵⁵ 21 U.S. (8 Wheat.) 174, 5 L. Ed. 539 (1823).

⁵⁶ 9 Pa. County Ct. Rep. 249 (1890).

⁵⁷ *First National Bank v. Smith*, 102 Ohio St. 120, 130 N.E. 502 (1921), *Edge v. Stuckey*, 40 Ohio App. 122, 178 N.E. 210 (1931).

⁵⁸ See *First National Bank v. Mullen*, 7 Ohio N.P. (N.S.) 313 at 331 (1908).

⁵⁹ *First National Bank v. Smith*, 102 Ohio St. 120, 130 N.E. 502, (1921), cited *supra* n. 57.

enumerated in the statute⁶⁰ and also the defense which will be relied upon if the judgment is vacated.⁶¹ The court must try and decide upon the grounds to vacate or modify before trying or deciding upon the validity of the defense.⁶² One of the grounds for vacating or modifying a judgment after term is, "For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking the judgment."⁶³ It has been held that this ground is applicable only where the defendant is objecting to the amount of the judgment and not where he contends that no judgment in any amount should be rendered.⁶⁴ This holding has not been questioned in later cases although another statement in the court's opinion needs to be read in the light of a subsequent Supreme Court pronouncement. This statement is as follows "The better practice as I regard it, is to require the defendant moving for vacation to proffer with his motion an answer duly verified, setting forth his defense which answer should be not merely a general denial of the petition, but should aver facts showing non-liability"⁶⁵

The Supreme Court case referred to involved the action of a common pleas court in suspending a cognovit judgment and giving leave for filing of a defense to the note without such a showing as is required for vacating a judgment rendered at a former term. The court of appeals affirmed the judgment of the lower court and the case was certified to the Supreme Court as being in conflict

⁶⁰ OHIO G. C. Sec. 11631.

⁶¹ OHIO G. C. Sec. 11637.

⁶² OHIO G. C. Sec. 11636.

⁶³ OHIO G. C. Sec. 11631.

⁶⁴ Metzger v. Zeissler, 13 Ohio N.P. (N.S.) 49 (1912).

⁶⁵ *Ibid.* at 55.

with another court of appeals case. The Supreme Court⁶⁶ recognized as a wholesome rule the practice of requiring the same sort of showing for vacating a judgment at term as is required for vacating after term. It held, however, that with or without such a general rule in effect, the court may not be limited or concluded in exercising its discretionary control during term to the method of procedure outlined in the statute for vacating at a subsequent term.⁶⁷

In a court of appeals opinion the following statement is found "This court has frequently held, where a motion to vacate a judgment is filed, that the presentation of a valid defense is sufficient ground for vacating the judgment and that a refusal to do so is an abuse of sound discretion."⁶⁸ With this in mind a study was recently made in Franklin County Common Pleas Court.⁶⁹ In a period of approximately eighteen months from August 1937 to February 1939 a total of 3510 civil cases were filed. 500 cases or 14.2 per cent of all the cases filed were those involving cognovit notes.

Considering now the 500 cognovit judgments, in 343 of them execution in the form of *fi-fa* orders⁷⁰ were issued to the sheriff and 235 times certificates of judgment⁷¹ were issued. Very often both were used but in 157 cases no at-

⁶⁶ First National Bank v. Smith, 102 Ohio St. 120, 130 N. E. 502 (1921), cited *supra* n. 57.

⁶⁷ *Accord* Edge v. Stuckey, 40 Ohio App. 122, 178 N.E. 210 (1931), cited *supra* n. 57. *Contra*: City of Cincinnati v. Archibale, 4 Ohio App. 218, 21 Ohio C.C. (N. S.) 582 (1915).

⁶⁸ Resnick v. Paryzek, 23 Ohio App. 327, 154 N.E. 350 (1926). This was a default judgment.

⁶⁹ Mr. John M. Bowsher of the Columbus Bar made the study in the spring of 1941 while he was a student in the College of Law. The procedure followed was to commence with cases filed long enough before the study to allow sufficient time for the parties to have followed up the judgment. Two years was taken as an adequate period and working backwards from that starting point all cases were noticed until a total of 500 cognovit note cases had been studied.

⁷⁰ OHIO G. C. 11653 et seq.

⁷¹ OHIO G. C. 11656,

tempt was made to acquire a lien. This should not be taken to indicate that all of these judgments were worthless, as the facts prove otherwise, for in 12 of these cases satisfaction was had, in whole or in part.

In 162 of the cases in which execution was issued the sheriff was able to find property of some kind belonging to the debtor, but 36 of these levies were returned unsatisfied "on account of prior liens," and in 40 cases the writ was marked "returned for want of time." And in 52 instances execution was ordered by plaintiff's attorney to be returned without any levy being made.

There were proceedings in aid of execution⁷² in 68 cases and of this number 11 were applications for appointment of a receiver. In 128 cases, 25.6 per cent of the total, the judgment was paid in whole or in part and sometimes these payments were made a considerable length of time after the judgments were taken. Although the study was commenced about two years after the date of the judgment of the most recent cases included in the study, it is likely that in some cases collection of unpaid judgments may yet take place.

Usually it is a simple matter to secure a judgment where a person has a warrant of attorney to confess judgment, and since there is also machinery for setting aside such judgments, it is of practical value to gain some idea of how often such machinery is employed and how often the judgment is set aside.

The study revealed that in only 26 cases, 5.2 per cent, was any attempt made to have the judgment set aside. Of this number 22 were motions to vacate and 4 were petitions. In 17 of the cases the judgments were set aside and in only two of them were the motions or petitions overruled. Two of the motions have never been ruled upon

⁷² OHIO G. C. 11788 et seq.

and in five cases settlements were made and the cases dismissed without a ruling by the Court on the motions. In the instances where the judgments were set aside, sometimes the cases were settled and dismissed, and in about half of them they proceeded to trial. Two of the trials resulted in verdicts for the defendant but in the others the plaintiffs again got verdicts and judgments, usually for the amounts of the original judgments.

Thus, it would seem that the warrant of attorney to confess judgment is a useful device when out of five hundred cognovit judgments only two were turned into verdicts for the defendants. It is not surprising that there is evidence of thought being given toward the extension of the device to other areas than those in which it has been customary heretofore.